[Filed October 27, 1994]

Docket No. 76106—Agenda 19—May 1994,
FEDERAL DEPOSIT INSURANCE CORPORATION,
Appellee and Cross-Appellant, v. MICHAEL J.
O'MALLEY, Appellant and Cross-Appellee.

JUSTICE NICKELS delivered the opinion of the court:

This case involves an action by plaintiff, the Federal Deposit Insurance Corporation (FDIC), to enforce a guarantee signed by defendant, Michael J. O'Malley, in connection with a bank loan. The bank that made the loan subsequently failed. The FDIC then took control of the bank's assets and found the guarantee in the bank's files. At trial, O'Malley argued that the guarantee was invalid from the outset or, in the alternative, had been extinguished by the bank before the FDIC acquired the bank's assets. The circuit court found, as a matter of law, that these defenses were barred by 12 U.S.C. § 1823(e) (1988). The circuit court therefore ruled in favor of the FDIC, and the appellate court affirmed. (249 Ill. App. 3d 340.) For the following reasons, we affirm the judgment of the appellate court.

I. FACTS

The parties presented the following evidence at trial. In 1975, Michael J. O'Malley and Wayne J. Bekta were directors and shareholders of the First National Bank of Oak Lawn (the Bank). They had also worked together as business partners in past real estate transactions. In 1975, O'Malley and Bekta became interested in purchasing and developing a tract of real estate located in Country Club Hills, Illinois. At this time, O'Malley and Bekta were acquainted with Dennis Dine, whom they knew as a customer of the Bank and an experienced real estate developer.

They therefore approached him and asked him if he would participate in the purchase of the Country Club Hills property. Dine agreed. The three of them subsequently determined that Dine would apply for a loan from the Bank and purchase the property. Later, if the property showed a profit from development or sale, the three would split this profit.

When Dine applied for the loan, he submitted the property as collateral. Bekta and O'Malley decided that, if the Bank did not approve the loan, they would offer their personal guarantees as security. O'Malley and Bekta therefore signed a guarantee in the amount of $225,000, the purchase price of the Country Club Hills property. They did not wait to see if the Bank would approve the loan without this additional security.

At trial, O'Malley acknowledged signing the guarantee and conceded that he was generally aware of the legal effect of a guarantee. O'Malley stated that he left the signed guarantee with Bekta but that he was uncertain of what happened to the guarantee after that point. The guarantee and two promissory notes signed by Dine were later found in the Bank's files. At trial, O'Malley claimed that the guarantee was not intended to be used unless additional security was needed. Dine also testified with respect to O'Malley's guarantee and supported O'Malley's testimony. He stated that he was unaware that Bekta or O'Malley had guaranteed the loan. The first time he became aware of any such guarantee was during his deposition.

John Geary was the loan officer who handled and approved the loan to Dine in 1975. Geary was also president of the Bank. At trial, Geary testified that the only collateral required for the loan was the Country Club Hills property. The purchased property was appraised at $420,000 and would therefore adequately serve as collateral for a loan of

$225,000. Geary testified that he first saw the guarantee during a deposition before trial.

O'Malley offered bank records into evidence. No reference to a guarantee was found in the loan proposal, the collateral checklist, or a collateral audit report. Other bank records also did not refer to the guarantee. In addition, Paul Adamonis, an employee of the FDIC, testified that he found no mention of the guarantee in the bank records, aside from the guarantee itself.

The Bank later sold the Dine notes to LaSalle National Bank (LaSalle). LaSalle's records did not refer to a guarantee signed by O'Malley and Bekta. LaSalle later sold the notes back to the Bank.

In 1979, four years after the Bank made the loan to Dine, O'Malley decided to end his relationship with the Bank. He therefore sold his stock and resigned as director. According to O'Malley, as part of the termination, the Bank and O'Malley exchanged mutual releases. At trial, O'Malley introduced a letter from the Bank, dated October 1, 1979, which purported to release O'Malley from any obligations he owed to the Bank, including guarantees. This letter did not refer to the Dine notes. The letter was signed by Bank president Geary and notarized by vice-president Adams. At the time, Geary had the requisite authority to release guarantees in the amount of $225,000, the amount of the guarantee. Neither Geary nor Adams was aware of the guarantee signed by O'Malley.

O'Malley also introduced a letter dated October 4, 1979, that he purportedly wrote to the Bank. In the letter, O'Malley released the Bank from any obligations it owed to him. Geary testified that he placed both letters in the bank files.

Adamonis, the FDIC examiner, testified that he did not find any releases in his examination of bank records. Adamonis searched Dine's loan file, the board of director minutes, the loan committee minutes, internal audit reports, and other bank records. Adamonis did not find any personal loan file of O'Malley among bank records. He also stated that the FDIC possessed 400 or 500 boxes of bank documents and that he had not personally inspected all of the documents. Adamonis had not personally inspected Bekta's personal loan file or the bank corporate files.

On April 29, 1983, about 3 1/2 years after the purported releases were exchanged, the Bank was declared insolvent. The FDIC took control of the Bank and acquired its assets. James Murphy, an FDIC employee, testified with respect to the closing procedures used by the FDIC. Murphy testified that he closed the Bank pursuant to standard FDIC procedures.

During the closing, Murphy found the guarantee signed by Bekta and O'Malley among the Bank's collateral files. The guarantee, on its face, provided that it was absolute, continuing, and applied unconditionally to all of Dine's obligations at the Bank, as they existed or would exist in the future. The guarantee also authorized the Bank to extend and renew Dine's obligations, authorized release of the guarantors, and authorized the Bank to waive notice and demand. Under the terms of the guarantee, no action by the Bank would impair the Bank's rights against either guarantor. The guarantee was specifically limited to $225,000, plus interest due on the note and legal expenses.

During the closing, Murphy also found two outstanding and unpaid notes signed by Dine. The note relating to the Country Club Hills real estate had been renewed by Dine, and the principal under the renewal note was $279,456.49. Murphy also found another note for $643,852.50 signed by

Dine. Dine did not pay any principal or interest on these notes. The FDIC subsequently sought repayment from Dine but Dine filed for bankruptcy. On September 15, 1983, the FDIC demanded payment from O'Malley under the terms of the guarantee. O'Malley refused and the FDIC brought this action. Further facts will be provided as needed for discussion.

II. LOWER COURT PROCEEDINGS

After a bench trial, the circuit court found that Dine was indebted to the Bank in excess of $225,000, that O'Malley had executed a guarantee for $225,000, and that the FDIC located the guarantee in the collateral files of the Bank. It then found that O'Malley was barred under 12 U.S.C. § 1823(e) (1988) from arguing that the guarantee was legally insufficient or had been extinguished. Accordingly, the circuit court entered judgment in favor of the FDIC for $464,490.89, representing $225,000 in principal and $239,490.89 in interest.

On January 16, 1990, O'Malley filed a post-trial motion in which he asserted that he was entitled to a new trial because, inter alia, the circuit court judge should have disqualified himself pursuant to Supreme Court Rule 63(C)(1)(c) based on his prior representation of the FDIC. O'Malley also contested, inter alia, the amount of interest awarded by the circuit court. After a hearing, the circuit court denied the motion for a new trial but reduced the amount of interest awarded from $239,490.89 to $81,666.14. The appellate court affirmed the judgment but modified the award of interest from $81,666.14 to $83,446.71.

On appeal to this court, O'Malley raises, inter alia, the following issues: (1) whether the circuit court judge violated Supreme Court Rule 63(C)(1)(c) by failing to disqualify him-

self; (2) whether 12 U.S.C. § 1823(e) (1988) bars O'Malley from asserting that the guarantee was not an asset of the Bank; and (3) whether section 1823(e) is constitutional. The FDIC has cross-appealed, claiming that the award of interest by the lower courts was incorrect. Other issues raised by O'Malley are discussed below.

III. DISQUALIFICATION OF THE CIRCUIT COURT JUDGE

O'Malley first argues that the circuit court violated Supreme Court Rule 63(C)(1)(c). At the time of trial, this Rule provided:

> "C. Disqualification.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where
>
> * * *
>
> (c) he was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy * * * or, for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law." (113 Ill. 2d R. 63(C)(1)(c).)

If a judge is disqualified under Rule 63(C)(1)(c), the judge may still participate in the proceedings. At the time of trial, Supreme Court Rule 63(D) provided:

> "D. Remittal of Disqualification.
>
> A judge disqualified by the terms of Canon 3(C)(1)(c) * * * may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification.

> If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship or interest is immaterial, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding." 113 Ill. 2d R. 63(D).

O'Malley contends that the circuit court judge represented the FDIC within seven years of the commencement of trial. O'Malley argues that the judge participated in the case even though the parties did not complete a written remittal of disqualification. O'Malley argues that disqualification can only be waived by a written remittal. Thus, according to O'Malley, there was no effective waiver of disqualification and a new trial is required. We disagree.

The record reveals the following pertinent facts. On March 13, 1989, before trial, the circuit court judge disclosed his previous representation of the FDIC and his involvement in the liquidation of Gateway National Bank. The judge did not disclose how recent his representation of the FDIC was. Both sides indicated orally that they had no objection to the judge continuing in the case.

The case then went to trial. O'Malley did not raise the issue of disqualification during trial, and the judge entered judgment in favor of the FDIC. On January 16, 1990, ten months after the judge disclosed his representation of the FDIC, O'Malley filed a post-trial motion, asking the judge to grant a new trial because the judge had failed to disqualify himself and obtain a written remittal. After the post-trial motion was filed, the judge investigated further and discovered that he had worked on three FDIC cases as an attorney about six years before trial. These cases all involved the liquidation of Gateway National Bank. The judge stated that he had been unaware his representation of the FDIC occurred within seven years of trial.

The judge then disclosed the following additional information to the attorneys:

> THE COURT: "Yes, I personally represented the FDIC in all three of those cases.
>
> I can also indicate to you that there was no personal representation by me within the seven-year period, although I must indicate—and I am doing this from handwriting on the orders of the proceedings that are within these files—I should also indicate to you that I was a named partner of that firm and everything that had to do with that firm's representation of the FDIC at all times was under my direct supervision. There was no other partner of that law firm that was charged with the responsibility of supervising the FDIC case assigned to that firm at any time.
>
> MR. CHALFEN [counsel for FDIC]: You did not personally appear in court?
>
> THE COURT: Within the seven-year period, to the best of my knowledge, no, but I want to make it clear. Every lawyer who did appear in that court for that law firm within that seven-period would have done so under my direct supervision.
>
> MR. CHALFEN: May I also clarify what your Honor indicated, I believe at the commencement of the trial that you never personally represented the FDIC in its corporate capacity?
>
> THE COURT: No. I represented it only in its capacity as liquidator or receiver of the Gateway National Bank of Chicago * * * ."

After a hearing on the post-trial motion, the circuit court held that Rule 63(C)(1)(c) was not violated. The judge concluded that the FDIC in its corporate capacity is a different "party," within the meaning of Rule 63(C)(1)(c), than the

FDIC acting in its receivership capacity. Because the judge had not represented the FDIC in its corporate capacity, Rule 63(C)(1)(c) was not violated.

On appeal, the appellate court questioned the circuit court's reasoning. A majority of the appellate court, however, affirmed the circuit court on a different ground. Because the circuit court judge had only exercised a limited supervisory role in the three previous FDIC cases, the majority concluded that the judge had not "represented" the FDIC within the meaning of Rule 63(C)(1)(c).

We do not reach the issues decided by the lower courts. We can affirm the decision below on any ground supported by the record. Under the facts of this case, we find that the circuit court judge disclosed the basis for disqualification before trial and that O'Malley had an opportunity to inquire further. By failing to do so, O'Malley has forfeited his right to raise the issue at this time.

In this case, the circuit court judge disclosed his representation of the FDIC at an early stage. He also stated that his representation of the FDIC was in connection with the liquidation of Gateway National Bank. O'Malley, however, did not pursue the matter further until an unfavorable judgment was entered against him.

In this appeal, O'Malley argues that disqualification can only be waived by written remittal. We disagree. The purpose of Rule 63(C)(1)(c) is to disqualify a judge from further proceedings where that judge may be biased because of his earlier representation of a party. The rule contemplates that the basis for disqualification will be disclosed at an early stage. It is then possible to obtain a substitute judge. Alternatively, the parties and attorneys may sign a remittal, free from the judge's coercion, and agree to let the judge proceed.

In this case, O'Malley seeks to use the rule differently. O'Malley does not seek prospective recusal of the judge; he seeks nullification of the trial. Before O'Malley can seek a new trial, he must show that he did not know the reason for disqualification or have a reason to know. Other courts have adopted similar reasoning. (See, e.g., United States v. Murphy (7th Cir. 1985), 768 F.2d 1518; Sacramento & San Joaquin Drainage District v. Jarvis (1959), 51 Cal. 2d 799, 336 P.2d 530; Haire v. Cook (1976), 237 Ga. 639, 229 S.E.2d 436; Renforth v. Fayette Memorial Hospital Association, Inc. (1979), 178 Ind. App. 475, 383 N.E.2d 368; Citizens First National Bank v. Hoyt (Iowa 1980), 297 N.W.2d 329.) To hold otherwise would permit a party to await the outcome of a trial and object only when the outcome is unfavorable.

O'Malley suggests that Woods v. Durkin (1989), 183 Ill. App. 3d 870, 132 Ill. Dec. 357, 539 N.E.2d 920, requires a different result. In Woods, before trial, the circuit court judge told the parties that his daughter-in-law was an associate in the law firm representing the defendant. The judge told the attorneys that, under the rules, the parties and attorneys would have to execute a signed waiver before he could proceed. The judge, however, obtained an oral waiver of disqualification from the attorneys and then entered an order relating to discovery. The plaintiffs brought a motion to vacate the order because the parties and attorneys had not completed a written remittal. The judge vacated the discovery order and said that he would hear no more motions until a written remittal was completed. On appeal, the appellate court held that the circuit court judge had no discretion to obtain an oral waiver rather than a written remittal. Thus, the attorneys' oral waiver of the disqualification was not sufficient and the discovery order was invalid.

We find no conflict between our reasoning in this case and the appellate court's reasoning in Woods. In Woods, the plaintiffs knew the reason for disqualification and promptly raised the issue of a written remittal before trial. Here, before trial, O'Malley knew the judge had represented the FDIC previously although O'Malley did not know how recent the representation was. O'Malley waited until after trial before determining when the representation occurred. He then argued that the judge should have obtained a written remittal.

We emphasize that judges may not ignore the written remittal requirement and obtain an oral waiver instead of a written one. Where a judge has disclosed his disqualification, he must obtain a written remittal before continuing. Parties, however, must exercise due diligence before they can use the written remittal requirement as the basis for a new trial.

We note that the result could be different in this case if actual prejudice were shown. O'Malley, however, has not shown actual prejudice from the judge's prior involvement with the FDIC, and we find no indication of prejudice from the record. Prejudice is not shown from the mere fact that O'Malley lost at trial. Thus, we will not excuse O'Malley's failure to raise the written remittal requirement earlier.

IV. SECTION 1823(e)

O'Malley next argues that the lower courts misapplied section 1823(e). In the circuit and appellate courts, the FDIC successfully invoked section 1823(e) to prevent O'Malley from arguing that the guarantee was legally insufficient or had been extinguished. Whether section 1823(e) applies in this case is a question of law, which we review de novo. Federal Deposit Insurance Corp. v. Wright (7th Cir. 1991), 942 F.2d 1089, 1097.

Section 1823(e) is based on the doctrine first announced in D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp. (1942), 315 U.S. 447, 86 L. Ed. 956, 62 S. Ct. 676. In D'Oench, the FDIC sued to enforce promissory notes signed by the defendant and found among bank files. The defendant had an agreement with the bank that he would not receive any proceeds from the notes. In return, the bank agreed not to enforce the notes against the defendant. The purpose of this arrangement was to inflate the apparent value of the bank's assets, thus deceiving bank regulators.

The Supreme Court held that the defendant was barred from asserting this arrangement with the bank. The Court discussed the circumstances under which such arrangements would be barred:

> "The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to be misled." (Emphasis added.) (D'Oench, 315 U.S. at 460, 86 L. Ed. at 963-64, 62 S. Ct. at 681.)

Thus, the Court held that such arrangements would be invalid against the FDIC even if a defendant did not intend to deceive the FDIC.

In 1950, Congress enacted 12 U.S.C. § 1823(e) (1988). This Federal statute provides:

> "No agreement which tends to diminish or defeat the right, title or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and any person or

> persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank." (12 U.S.C. § 1823(e) (1988).)

An agreement that fails to meet all four requirements is barred. (Federal Deposit Insurance Corp. v. Manatt (8th Cir. 1991), 922 F.2d 486, 488; Wright, 942 F.2d at 1101.) Agreements that would ordinarily be valid under State law are invalid against the FDIC unless they meet the statutory requirements. Federal Deposit Insurance Corp. v. Powers (N.D. Ill. 1983), 576 F. Supp. 1167, 1169, aff'd (7th Cir. 1984), 753 F.2d 1076.

The Supreme Court has construed section 1823(e) narrowly. (Langley v. Federal Deposit Insurance Corp. (1987), 484 U.S. 86, 98 L. Ed. 2d 340, 108 S. Ct. 396.) In Langley, the FDIC sued to enforce notes signed by the defendants. The Court held that section 1823(e) precluded the defendants from arguing that a bank's fraudulent misrepresentations induced them to sign the notes. The Court adopted a strict construction of the statute and discussed the reasons for the statutory requirements:

> "One purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets. Such evaluations are necessary when a bank is examined for fiscal soundness by state or federal authorities [citation], and when the FDIC is deciding whether to liquidate a failed bank [citation], or to provide financing for purchase of its assets (and assumption of its liabilities) by another bank [citation]. The last kind of evaluation, in particu-

lar, must be made 'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.' [Citation.] Neither the FDIC nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions.

A second purpose of § 1823(e) is implicit in its requirement that the 'agreement' not merely be on file in the bank's records at the time of an examination, but also have been executed and become a bank record 'contemporaneously' with the making of the note and have been approved by officially recorded action of the bank's board or loan committee. These latter requirements ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure.

* * *

* * * Petitioners are really urging us to engraft an equitable exception upon the plain terms of the statute. Even if we had the power to do so, the equities petitioners invoke are not the equities the statute regards as predominant. While the borrower who has relied upon an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by his failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute. * * *

The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e)." Langley, 484 U.S. at 91-95, 98 L. Ed. 2d at 347-49, 108 S. Ct. at 401-03.

V. APPLICATION OF SECTION 1823(e)

In this case, O'Malley seeks to avoid application of section 1823(e) entirely. He examines the language of section 1823(e) and argues that the FDIC must first acquire an asset before the statute applies. According to O'Malley, the FDIC has the burden of establishing the existence of an asset before it can invoke the statute. O'Malley presents three separate "no-asset" arguments.

A. Legal Sufficiency of the Guarantee

O'Malley first argues that the guarantee never formed part of the Dine loan transaction. He argues that he left the guarantee with Bekta, to be used only if Dine could not get the loan otherwise. In support of his argument, O'Malley relies on bank records that do not refer to a guarantee. O'Malley contends that it was insufficient for the FDIC to merely show that a document called a "guarantee" existed in the bank files.

As the appellate court noted, O'Malley's argument is very similar to an argument rejected in Powers, 576 F. Supp. 1167. In Powers, the FDIC sued to enforce a guarantee. Although Powers acknowledged signing the guarantee, he argued that he had never agreed to let the bank use the guarantee. When Powers signed the document, he left the remainder of the document blank, to be completed later. The FDIC later found the guarantee among the bank's files. Powers introduced affidavits to prove that the guarantee was not executed in connection with the underlying loan. The court, however, barred Powers' defenses under section 1823(e), finding that Powers relied on an unwritten understanding to undermine a facially sufficient guarantee.

Other courts have barred unwritten understandings arising under similar circumstances. See, e.g., Wright, 942

F.2d 1089 (note maker was barred from asserting that notes found in bank files were not intended to be used until bank approved a line of credit); Federal Deposit Insurance Corp. v. McClanahan (5th Cir. 1986), 795 F.2d 512 (the defendant "recklessly" signed a document in blank and thereby lent himself to a scheme that permitted the misrepresentation of assets); Adams v. Madison Realty & Development, Inc. (3d Cir. 1991), 937 F.2d 845 (investors who signed unconditional promissory notes could not raise fraud in the inducement as a defense); Federal Deposit Insurance Corp. v. Gardner (S.D. Miss. 1985), 606 F. Supp. 1484 (note maker could not assert agreement between bank president and note maker that bank would look solely to a third party for payment of the note).

Ultimately, O'Malley's argument is based on an understanding between O'Malley and Bekta that the guarantee would only be used if Dine could not get the loan on his own. O'Malley signed the guarantee, he left it with a bank director, the FDIC found the guarantee in the files, and O'Malley now argues that the guarantee would not be used unless certain circumstances arose. O'Malley's argument is based on the existence of an unwritten understanding that does not meet the statutory requirements. Once the FDIC found the guarantee in the bank records, it did not have to disregard the facially sufficient guarantee simply because other bank records did not refer to it. See Bowen v. Federal Deposit Insurance Corp. (5th Cir. 1990), 915 F.2d 1013, 1016 (the FDIC "has no duty to compile oral histories of the bank's customers and loan officers" and need not "retain linguists and cryptologists to tease out the meaning of facially-unencumbered notes"); Armstrong v. Resolution Trust Corp. (1993), 157 Ill. 2d 49, 191 Ill. Dec. 46, 623 N.E.2d 291 (the borrowers could not avoid section 1823(e) by inferences drawn from bank records); see also Federal Deposit Insurance Corp. v. O'Neil (7th Cir. 1987), 809 F.2d

350, 353-54; Federal Deposit Insurance Corp. v. Zook Brothers Construction Co. (9th Cir. 1992), 973 F.2d 1448, 1453; Beighley v. Federal Deposit Insurance Corp. (5th Cir. 1989), 868 F.2d 776, 783-84.

B. Release

O'Malley next argues that he had a release agreement with the Bank that extinguished the guarantee. According to O'Malley, O'Malley and the Bank agreed to end their working relationship in 1979 and exchanged mutual letters of release. The circuit court found that this release agreement did not meet the requirements of section 1823(e). Specifically, the purported release agreement was not approved by the board of directors or loan committee of the Bank. O'Malley argues that the statutory requirements do not apply to the release agreement. According to O'Malley, section 1823(e) does not bar agreements showing that the FDIC never acquired an asset.

Federal courts have rejected O'Malley's argument. (Federal Deposit Insurance Corp. v. P.L.M. International, Inc. (1st Cir. 1987), 834 F.2d 248, 252; Wright, 942 F.2d at 1100-01; Federal Deposit Insurance Corp. v. Merchants National Bank (11th Cir. 1984), 725 F.2d 634, 639; Zook, 973 F.2d at 1452-53; Federal Deposit Insurance Corp. v. Waldron (D.S.C. 1979), 472 F. Supp. 21, 25) (this "no-asset" argument is "circular" because it requires a defendant to rely on an agreement, barred by the statute, to show that no asset exists); (Federal Deposit Insurance Corp. v. Cover (D. Kan. 1988), 714 F. Supp. 455 (an asset shown in the records of the bank remains an asset for purposes of section 1823(e) until the defendants show payment or introduce an agreement meeting the requirements of section 1823(e)).) Section 1823(e) allows the FDIC to rely on facially unqualified instruments contained in bank records. Agreements that

defeat these facially unqualified instruments must meet the statutory requirements. To allow O'Malley's defense would render the protection of the statute meaningless. Merchants, 725 F.2d at 639.

O'Malley relies on Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240, and Federal Deposit Insurance Corp. v. Prann (D.P.R. 1988), 694 F. Supp. 1027, aff'd sub nom. Federal Deposit Insurance Corp. v. Bracero & Rivera (1st Cir. 1990), 895 F.2d 824, to support his "no-asset" argument. In those cases, however, the courts found that the underlying debts had been paid. Section 1823(e) does not apply where "the parties contend that no asset exists * * * and that such invalidity is caused by acts independent of any understanding or side agreement." (Emphasis in original.) (Merchants, 725 F.2d at 639.) A party asserting payment as a defense is not relying on a separate agreement to prove the asset invalid. (Federal Deposit Insurance Corp. v. Bracero & Rivera (1st Cir. 1990), 895 F.2d 824, 830.) In contrast, O'Malley's release defense is based on an agreement between O'Malley and the Bank.

Federal courts have applied section 1823(e) to bar individuals from asserting release agreements. In P.L.M., 834 F.2d at 252, the court rejected an argument based on similar facts. In that case, the defendants signed a continuing guarantee in favor of the bank. The defendants later obtained a release from the bank, but the guarantee remained in an active collateral file with no notation of cancellation. The FDIC sued to enforce the guarantee, and the defendants offered the release agreement to show that the guarantee had been extinguished before the FDIC took control. The court barred the use of this release agreement because it failed to meet the requirements of section 1823(e). See also Federal Deposit Insurance Corp. v. Rivera-Arroyo (1st Cir.

1990), 907 F.2d 1233 (written release agreements did not meet requirements of section 1823(e) and were therefore barred); Manatt, 922 F.2d 486 (the defendant, who had been a stockholder and lawyer for a bank, was barred from asserting an agreement where the notes were in the bank's files and bore no notation of cancellation); Resolution Trust Corp. v. McCrory (5th Cir. 1992), 951 F.2d 68 (the defendants could not assert a letter agreement of release even though bank officers testified that they had executed the agreement, two documents in the bank's official files referred to the agreement, and the agreement was kept in the files of the bank's outside attorney); Federal Deposit Insurance Corp. v. Krause (8th Cir. 1990), 904 F.2d 463 (the defendants could not assert a settlement agreement with the bank president because the notes were located in the bank's active files, bore no "paid" notation, and the bank's minutes did not reflect approval of this agreement); see also Federal Deposit Insurance Corp. v. Allen (6th Cir. 1986), 801 F.2d 863 (written agreement located in the bank's loan file was barred because it did not satisfy all of the statutory requirements).

O'Malley also relies on Federal Deposit Insurance Corp. v. Nemecek (D. Kan. 1986), 641 F. Supp. 740, to support his "no-asset" argument. In Nemecek, the court allowed the defendants to introduce an oral accord and satisfaction against the FDIC. In that case, the court held that an oral accord and satisfaction extinguished a note before the FDIC took control of a bank, so section 1823(e) did not apply. O'Malley argues that the same reasoning should apply to his release agreement.

We note that the reasoning in Nemecek has been criticized by other courts. (Federal Deposit Insurance Corp. v. National Consumer Alliance, Inc. (D. Kan. 1994), 1994 WL 326064 (noting that Nemecek was decided before the

Supreme Court's narrow construction of section 1823(e) in Langley); Cimarron Federal Savings & Loan Association v. McKnight (Okla. App. 1992), 840 P.2d 648; Cover, 714 F. Supp. 455.) In Cover, the court stated that to adopt the logic of Nemecek "would destroy the effect and protection of § 1823(e) and hamper the FDIC's ability to follow the purchase and assumption alternative by injecting uncertainty into the valuation of assets." (Cover, 714 F. Supp. 458.) In addition, the Nemecek reasoning is inconsistent with the reasoning of other courts that have addressed O'Malley's "no-asset" argument. We therefore decline to follow Nemecek.

C. Cancellation

O'Malley next argues that his release defense arises from the instrument the FDIC seeks to enforce. The guarantee explicitly gave the Bank the right to release O'Malley from his obligation. In some instances, Federal courts have held that section 1823(e) does not apply where a defense arises from the instrument the FDIC seeks to enforce.

O'Malley relies on Howell v. Continental Credit Corp. (7th Cir. 1981), 655 F.2d 743, and Riverside Park Realty Co. v. Federal Deposit Insurance Corp. (M.D. Tenn. 1978), 465 F. Supp. 305, in support of his position. In Howell, Continental Credit Corporation (Continental) and Howell entered into several lease agreements, which imposed obligations on both parties. Continental subsequently breached the agreements. The FDIC later took control of Continental and sought to enforce the leases against Howell. The Seventh Circuit held that the FDIC could not ignore the terms contained on the face of the leases. The court distinguished earlier cases involving "a facially valid note or guarantee imposing a unilateral obligation" to pay. Howell, 655 F.2d at 746.

In Riverside, the FDIC sought to foreclose a deed of trust that specifically incorporated the terms of a loan agreement by reference. Again, the court did not invoke section 1823(e) because the terms of the loan agreement appeared on the deed of trust that the FDIC was trying to enforce. Riverside was therefore allowed to raise breach of the loan agreement as a defense. The court found that section 1823(e) did not apply because "the asset upon which the FDIC is attempting to recover is the very same agreement that the makers allege has been breached." (Emphasis in original.) Riverside, 465 F. Supp. at 313.

In both cases, the court held that the FDIC could not selectively seek to enforce an agreement. The FDIC could not enforce some terms and ignore others that appeared in the same agreement. Here, in contrast, the guarantee did not contain terms that imposed responsibilities on the Bank. The guarantee provided only for the bare possibility that the Bank might issue a release at some point in the future. Thus, the FDIC would not know from a review of the guarantee that such a release existed. (See Federal Deposit Insurance Corp. v. Venture Contractors, Inc. (7th Cir. 1987), 825 F.2d 143, 149-50 (refusing to apply Howell to a continuing guarantee that imposed a unilateral obligation to pay); O'Neil, 809 F.2d at 354 (refusing to apply Howell because the note merely referred to a side agreement and did not contain the terms of the side agreement).) In this case, O'Malley relies on a separate release agreement to extinguish the guarantee.

In a related argument, O'Malley contends that the guarantee provides him with the unilateral right to cancel by giving written notice to the Bank. He again argues that this defense arises from the language of the guarantee and is therefore not barred by section 1823(e). O'Malley relies on Federal Deposit Insurance Corp. v. Panelfab Puerto Rico,

Inc. (1st Cir. 1984), 739 F.2d 26. In Panelfab, the court allowed the defendants to introduce a letter of cancellation because the letter was not part of a separate agreement between the bank and the defendants. But see O'Neil, 809 F.2d 350; P.L.M., 834 F.2d 248; Federal Deposit Insurance Corp. v. Virginia Crossings Partnership (8th Cir. 1990), 909 F.2d 306 (cancellation letter barred by section 1823(e)).

Even assuming that section 1823(e) does not apply to this written notice of cancellation, we find that O'Malley never executed a written notice satisfying the terms of the guarantee. The guarantee specifically requires written notice by O'Malley for cancellation. The circuit court found that no evidence had been introduced to show that O'Malley had invoked his right to cancel by written notice. The only written document to the Bank offered by O'Malley was a copy of a letter he purportedly sent to the Bank. The letter purported to release the Bank from its obligations; it did not refer to any obligations O'Malley owed to the Bank. Thus, even if section 1823(e) allows evidence of cancellation by written notice, O'Malley has not shown that he gave written notice.

VI. CONSTITUTIONALITY OF SECTION 1823(e)

O'Malley argues that the lower courts erred in requiring strict compliance with section 1823(e). He contends that those courts should have required only substantial compliance. We find this argument contrary to established law.

O'Malley argues that the release substantially complied with section 1823(e). In this case, the circuit court found that the purported release was not approved by the Bank's board of directors or loan committee and was not reflected in the minutes. O'Malley argues that it should be enough that Geary's authority to issue the release is part of the

board minutes. This specific argument has been rejected. Gardner, 606 F. Supp. 1484 (agreement between bank president and note makers was not valid because the agreement was not specifically approved by the board of directors or the loan committee even though the president had the authority to make such an agreement).

In addition, the Supreme Court has emphasized that courts must strictly construe the statute. (Langley, 484 U.S. at 95, 98 L. Ed. 2d at 349, 108 S. Ct. at 403.) The equities favor the FDIC and depositors, and Congress has erred on the side of certainty. (Langley, 484 U.S. at 94-95, 98 L. Ed. 2d at 349, 108 S. Ct. at 403; see also Wright, 942 F.2d at 1101; Federal Deposit Insurance Corp. v. Caporale (1st Cir. 1991), 931 F.2d 1, 2 ("As among borrowers, thrift regulators, depositors, and creditors, the borrower is in the best position to protect himself and must therefore suffer the risk of loss if he fails to ensure that his agreement is properly recorded").) As the appellate court noted, we are not at liberty to rewrite the plain terms of the statute.

O'Malley next contends that section 1823(e), if literally applied, is unconstitutional. O'Malley argues that the statute violates due process, equal protection, and impairs contractual rights. O'Malley, however, provides little support for these arguments and little authority for his reasoning. Courts have consistently rejected similar arguments. Chatham Ventures, Inc. v. Federal Deposit Insurance Corp. (5th Cir. 1981), 651 F.2d 355, 362-63; Beighley v. Federal Deposit Insurance Corp. (N.D. Tex. 1987), 676 F. Supp. 130, 132-33; Resolution Trust Corp. v. Dadonna (3d Cir. 1993), 9 F.3d 312, 320-21; Campbell Leasing, Inc. v. Federal Deposit Insurance Corp. (5th Cir. 1990), 901 F.2d 1244, 1248); see generally S. Lake, Banking Law: The D'Oench Doctrine and 12 U.S.C. § 1823(e): Overextended, but Not Unconstitutional, 43 Okla. L. Rev. 315 (1990) (dis-

cussing constitutional challenges based on taking of property without just compensation, procedural and substantive due process, and right to trial by jury).

VII. OTHER ISSUES

In addition to the three issues discussed above, O'Malley has raised the following issues: (4) whether the sale of the Dine notes to LaSalle discharged O'Malley; (5) whether the Bank's continued extensions of credit to Dine discharged O'Malley; (6) whether an alleged settlement between Bekta and the FDIC entitled O'Malley to a setoff; (7) whether the FDIC's alleged release of Bekta operated to partially release O'Malley; and (8) whether the appellate court awarded the appropriate amount of interest to the FDIC. The FDIC argues that these issues have been waived because they were not raised in the petition for leave to appeal. Under Rule 315(b)(3), a petition for leave to appeal shall state "the points relied on for reversal of the judgment of the Appellate Court." (134 Ill. 2d R. 315(b)(3).) A party's failure to raise an argument in the petition for leave to appeal may be deemed a waiver of that argument. (Dineen v. City of Chicago (1988), 125 Ill. 2d 248, 265-66, 126 Ill. Dec. 52, 531 N.E.2d 347.) Accordingly, we find these additional issues waived and decline to address them.

Finally, we note that the FDIC has cross-appealed the appellate court's award of interest. An examination of the guarantee shows that it fails to specify an interest rate. The circuit court concluded that O'Malley and the Bank intended for the rate in the underlying note to apply to the guarantee. At trial, the FDIC produced testimony concerning the interest rate used in the note. This interest rate was related to Continental Bank's prime rate. The circuit court found that the FDIC testimony failed to disclose the actual rates used or the source of these rates. The circuit court,

however, found that interest could be supported by other evidence produced at trial. The trial balance of the Bank on April 28, 1983, which showed the total interest due on Dine's notes, had been introduced as a business record. The circuit court therefore based its interest calculation on this balance. It did not award any interest after April 28 because the FDIC failed to prove the interest due under the guarantee. The appellate court agreed with the procedure used but found that the calculation was incorrect. It therefore modified the amount of interest awarded. After reviewing the record, we find no error in the appellate court's award of interest.

For the foregoing reasons, the judgment of the appellate court is affirmed.

Affirmed.

CHIEF JUSTICE BILANDIC, dissenting:

The majority opinion is fatally flawed by its erroneous application of section 1823(e) to the facts of this case. O'Malley's guarantee was discharged by mutual releases exchanged between O'Malley and the Bank. The FDIC has no authority to enforce a nonexistent guarantee. For this reason, I respectfully dissent.

Section 1823(e) provides that the rights and interests of the FDIC in assets acquired from a bank pursuant to its statutory duties cannot be diminished or defeated by agreements that do not meet certain requirements. (12 U.S.C. § 1823(e) (1988).) This section was enacted to protect the FDIC from secret agreements, and deceptive schemes or arrangements, between a bank and an obligor, which tend to misrepresent a bank's assets and ultimately mislead the FDIC. See Langley v. Federal Deposit Insurance Corp.

(1987), 484 U.S. 86, 92-93, 98 L. Ed. 2d 340, 347-48, 108 S. Ct. 396, 401-02; Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240, 1245; Armstrong v. Resolution Trust Corp. (1993), 157 Ill. 2d 49, 61-62, 191 Ill. Dec. 46, 623 N.E.2d 291.

Section 1823(e), by its own terms, is not applicable under the facts of this case. Section 1823(e) applies only to assets acquired by the FDIC in a takeover. It does not apply to situations where no asset exists because it has been extinguished prior to the FDIC's takeover of the bank. See Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240; Federal Deposit Insurance Corp. v. Prann (D.P.R. 1988), 694 F. Supp. 1027, aff'd (1st Cir. 1990), 895 F.2d 824.

In this case, the guarantee that O'Malley executed in 1975 did not exist and thus was not an asset of the Bank at the time the FDIC acquired the Bank's assets. Approximately four years before the FDIC took over the Bank, O'Malley received a written release from the Bank, signed by its president, which released O'Malley from all obligations owed to the Bank. In consideration for this release, O'Malley released the Bank from any obligations it owed to him. Section 1823(e) does not apply to the facts here because O'Malley's release was not a secret agreement designed to deprive the FDIC of an otherwise valid asset. Rather, the release demonstrates that the guarantee was not an asset of the Bank at the time the FDIC took over the Bank. Thus, the majority incorrectly applies section 1823(e) in this case to prevent an innocent party from asserting a valid release.

Several courts have recognized that section 1823(e) does not apply under circumstances such as those at issue here.

In Commerce, a deed of trust was executed as security for a loan. The deed of trust contained a clause covering future

debts. The balance of the loan was subsequently paid, and the bank orally agreed to release the deed of trust. Meanwhile the bank failed and the FDIC was appointed as receiver of its assets. The FDIC acquired various assets of the failed bank, including the deed of trust and a second promissory note. The FDIC refused to release the deed of trust, contending that the second promissory note was secured by the deed of trust. The FDIC argued that the oral agreement to release the deed was barred by section 1823(e). The Sixth Circuit rejected the FDIC's position and held that the deed of trust was not an asset acquired by the FDIC. (Commerce, 872 F.2d at 1246.) The court concluded that the original loan had been satisfied before the FDIC's involvement and that the oral agreement to release the trust deed was enforceable and not barred by section 1823(e). Commerce, 872 F.2d at 1246.

Similarly, in Prann, the FDIC sought to recover on a promissory note. The court held that section 1823(e) was not applicable because the debt underlying the note was satisfied before the FDIC acquired the bank's assets. (Prann, 694 F. Supp. at 1037.) Consequently, the note was not an asset protected by section 1823(e).

The majority opinion attempts to distinguish Commerce and Prann by pointing out that the underlying debts had been paid, whereas in the instant case O'Malley relies on a release. The majority fails to comprehend that an obligation can be discharged in a number of ways, including obtaining a valid release. Consequently, the fact that the methods of discharge differed in those cases and the instant case is insignificant. Nonetheless, it is significant that full payment in Commerce and Prann and full release of O'Malley in the instant case both occurred prior to the FDIC's acquisition of any assets. By discharging the release prior to the FDIC's takeover of the Bank, the guarantee did not exist as an asset.

For the reasons stated, the FDIC had no authority to consider the guarantee as an asset of the Bank. Since it was not an asset of the Bank, it could not be enforced against O'Malley. Accordingly, I dissent from the majority's decision.

JUSTICE HARRISON, also dissenting:

The circuit judge admitted that he represented the FDIC within seven years of the commencement of trial. Under the clear and unambiguous language of Rule 63(C)(1)(c) (113 Ill. 2d R. 63(C)(1)(c)), the judge could not sit on the case and was required to disqualify himself. (See Woods v. Durkin (1989), 183 Ill. App. 3d 870, 874, 132 Ill. Dec. 357, 539 N.E.2d 920.) Although Rule 63(D) (113 Ill. 2d R. 63(D)) has a provision for remittal of disqualification, there is no dispute that the requirements of that provision were not satisfied here. O'Malley is therefore entitled to a new trial.

The majority denies this relief on the theory that O'Malley failed to exercise due diligence. Such a position is untenable as a matter of law. Under the system we have fashioned, the burden of insuring compliance with the rules governing disqualification lies with the judge, not the litigants. If a judge is disqualified under Rule 63(C)(1)(c), he must remove himself from the case. The matter is not discretionary, and does not depend on action by the parties. Judges are expected to recognize on their own when they should refrain from hearing a case. It could not be otherwise, for often the judge will be the only one in the courtroom who knows of the facts that disqualify him.

The terms of our disqualification rules are clear and absolute. Once disqualified, a judge remains disqualified unless the requirements of the remittal provision are satisfied.

(See Woods, 183 Ill. App. 3d at 874.) There are no exceptions, and the rule is not subject to waiver by oral agreement of counsel. (See Woods, 183 Ill. App. 3d at 875.) If the judge wants to hear the case, it is up to him to obtain the necessary written agreement. (113 Ill. 2d R. 63(D).) The rule provides that he may ask the parties and their attorneys to consider waiver of disqualification. It does not obligate the parties or their attorneys to ask that he ask or to otherwise police his judicial responsibilities.

The majority's position must also fail on the facts. O'Malley could not have pursued the matter of disqualification sooner because he did not know about it. As the appellate court noted, O'Malley was not in court when the judge disclosed his representation of the FDIC, and O'Malley's attorney never discussed waiver of any conflict of interest with him. (249 Ill. App. 3d at 361.) That O'Malley's attorney knew of the judge's connection to the opposing party is of no consequence. Under the express terms of Rule 63(D), agreement of counsel is insufficient. The parties themselves must agree to remittal of the disqualification in order for it to be effective. O'Malley did not so agree. The circuit judge was therefore prohibited from hearing the case. Accordingly, I dissent.

(Letterhead Of)

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December 5, 1994

No. 76106—Federal Deposit Insurance Corporation, appellee, v. Michael J. O'Malley, appellant. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 15, 1994.

Opinion of the Appellate Court of Illinois
First District—Fifth Division
No. 1-90-1718—Filed June 25, 1993

Federal Deposit Insurance Corporation,

Plaintiff-Appellee and Cross-Appellant,

v.

Michael J. O'Malley,

Defendant-Appellant and Cross-Appellee.

Appeal from the Circuit Court of Cook County.
The Honorable Thomas E. Hoffman, Judge Presiding.

JUSTICE COUSINS, JR. delivered the opinion of the court:

The defendant, Michael J. O'Malley (O'Malley), appeals from the final judgment of the circuit court entered against him and in favor of the plaintiff, the Federal Deposit Insurance Corporation (FDIC). On April 29, 1983, the First National Bank of Oak Lawn (the Bank) was closed due to insolvency, and the FDIC, in its corporate capacity, obtained the assets of the Bank for the purpose of liquidation. Among the Bank's records, the FDIC found an original written guaranty signed by O'Malley which purported to guarantee the indebtedness of one Dennis G. Dine (Dine). On January 1, 1984, the FDIC, in its corporate capacity, brought suit against O'Malley to enforce the guaranty. O'Malley claimed that the guarantee never formed part of the Dine loan transaction. O'Malley also argued, inter alia, that the Bank released him from all obligations prior to the FDIC takeover. Following a bench trial, the circuit court

held that O'Malley's defenses were barred by 12 U.S.C. 1823(e) and entered judgment in favor of FDIC.

We affirm.

BACKGROUND

The First National Bank of Oak Lawn was declared insolvent and closed on April 29, 1983. The FDIC, in its corporate capacity, obtained the assets of the Bank for purposes of liquidation. Among the Bank's records, the FDIC found an original written guaranty signed by O'Malley which purported to guarantee the indebtedness of Dennis Dine.

O'Malley's guaranty provided that it was absolute and continuing, and that O'Malley unconditionally guaranteed all of Dine's obligations to the Bank, whether then existing or created in the future. Among other things, the guaranty authorized the Bank's extension or renewal of Dine's obligations, release of liability of any of the guarantors, and waivers of notice and demand. O'Malley's guaranty was limited to the amount of $225,000, plus interest on such amount and expenses.

The Bank's records also contained two outstanding and unpaid original Dine notes. Evidence indicated that Dine was indebted to the Bank in the amount of at least $225,000 since February, 1975, when he borrowed money from the Bank to purchase real estate. Dine subsequently signed a renewal note in the principal amount of $279,456.49 and another note in the principal amount of $643,852.50, both of which were dated April 28, 1981 and due October 26, 1981. Dine did not repay any principal or interest due under his two notes.

On September 15, 1983, FDIC sent a letter to O'Malley demanding payment under the guaranty, but O'Malley failed to pay any amounts to the FDIC. On January 1, 1984, FDIC brought suit against O'Malley to recover the amount due from O'Malley under the guaranty.

O'Malley denied that he ever guaranteed the 1981 Dine loans and denied that the guaranty he signed was ever used or required in connection with any Dine loan at the Bank. Alternatively, O'Malley raised two affirmative defenses. First, that in 1979, four years prior to the FDIC takeover, he had been released in writing by the Bank from any guaranty obligations. Second, O'Malley claims that the exchange of mutual releases between the Bank and O'Malley in 1979 served as notice in writing to the Bank that any claimed guaranties were cancelled as of October 1979.

With respect to O'Malley's contention that the guaranty was never used or required in connection with any of the Dine loans, O'Malley presented the following evidence at trial. O'Malley testified that in 1975 both he and Wayne J. Bekta (Bekta) were on the board of directors of the Bank. O'Malley and Bekta were also business partners in various real estate transactions and developments. In 1975, he and Bekta became interested in developing a piece of real estate in Country Club Hills, Illinois. Dine, an experienced real estate developer and a long standing customer of the Bank, also participated in the transaction. The parties agreed that Dine would borrow money, purchase the property and take title to the property; when the property was developed or sold, all three parties would profit.

Bekta and O'Malley subsequently agreed, between themselves, that if Dine could not get the loan for the $225,000 purchase price on his own, they would supply their personal guaranty. Sometime prior to February 28, 1975, Bekta and O'Malley signed the guaranty form in Bekta's car while the two were making an inspection of their business properties. O'Malley left the guaranty with Bekta.

On February 28, 1975, Dine secured the loan for $225,000. Evidence presented at trial indicated that the

guaranty was not used in connection with the loan because the property was appraised for loan purposes at $420,000, nearly twice the amount of the purchase price. O'Malley testified that he did not know how the guaranty document got into the Bank file. At the time of trial, Bekta was deceased.

John Geary testified that in 1975, he was president of the Bank and that Dine had been a customer of the Bank for some years prior and subsequent to 1975. Geary was the loan officer who personally handled and approved the $225,000 loan to Dine on February 28, 1975. The only collateral required for the Dine loan was the Country Club Hills property which had been appraised at $420,000. Geary testified that the Dine loan was not made on the basis of any guaranty signed by Bekta or O'Malley. He testified that the first time he had ever seen the guaranty signed by O'Malley and Bekta was during his discovery deposition.

A number of documents pertaining to the Dine loan supported Geary's testimony. For example, the loan proposal prepared by Geary in 1975 contains no indication of any guaranty requirements. The collateral checklist likewise does not indicate that a guaranty was required for the Dine loan. Additional documents admitted at trial corroborated Geary's testimony as well.

Dine testified that in 1975 he was a real estate developer. In 1975, he agreed with Bekta and O'Malley to purchase the Country Club Hills property because he hoped to receive a commission upon resale. He borrowed the money, took title to the property in a land trust, and assigned the beneficial interest of the land trust to secure the $225,000 loan in 1975. Dine testified that at no time was anyone, other than himself, required to guaranty the loan. He testified that the first time he ever saw or heard of the guaranty document in this case was at his discovery deposition.

In April of 1981, the two 1981 Dine loans were sold to the LaSalle National Bank, and the sale was approved by Geary. Mark Hoppe, vice president of the commercial lending department at LaSalle National Bank testified that he was unable to locate any document among LaSalle's records that would indicate that a guaranty formed a part of the collateral or other documentation for the Dine loans purchased by LaSalle National Bank. The Bank later chose to repurchase the loans, though it was under no legal obligation to do so.

With respect to O'Malley's affirmative defense that he was released from any guaranty obligations prior to the FDIC takeover, the following evidence was presented at trial. O'Malley testified that in 1979, five years after the loan was made and four years before the FDIC takeover, O'Malley sold his stock in the Bank and resigned as a director. He had no further dealings with the Bank after that date.

John Geary corroborated O'Malley's testimony. Geary testified that in 1979, O'Malley sold his stock in the Bank and terminated his business relationships with the Bank. This was part of an arm's length transaction and both sides were represented by counsel. At that time Geary, as president of the Bank, gave O'Malley a written release from any and all obligations at the Bank including any guaranties. The release was witnessed by the vice president of the Bank, Nancy Adams. In return, Geary demanded and received from O'Malley a written release, releasing the Bank from any claims by O'Malley. Geary was authorized to execute releases to the same extent that he was authorized to approve loans. His lending authority at the time for secured loans was between $350,000 and $750,000. Geary testified that the release documents were placed in the Bank's records.

However, Greg Adamonis, an FDIC liquidator and one of plaintiff's witnesses, testified that he was unable to locate a copy of the Bank's release to O'Malley among the Bank's records. Adamonis also testified that there were 400 or 500 boxes of bank documents in the possession of the FDIC and that he had not inspected them all. Among the files Adamonis did not inspect were O'Malley's files, Bekta's files and the Bank's corporate files. The defendant sought leave to have an expert, Ernst & Whinney, conduct a document audit of the Bank's records to attempt to locate a copy of the release or other relevant information. Defendant also sought the disclosure of the names of the FDIC "closing team" who participated in the closing of the bank. The circuit court refused to grant O'Malley's request and denied O'Malley's motion. Therefore, O'Malley claims that he was not in a position to rebut the testimony of the FDIC witnesses that a copy of the "release" was not in the Bank's records at the time of closing.

The FDIC did not attack the underlying validity of the release given to O'Malley. Instead, the FDIC took the position that O'Malley was precluded from asserting the release against the FDIC because the release failed to meet the requirements of 12 U.S.C. 1823(e) which provides in relevant part:

> "No agreement which tends to diminish or defeat the right, title or interest of the Federal Deposit Insurance Corporation and any asset acquired by it under this Section either as security for a loan or by purchase shall be valid against the Corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the

board of directors of the bank or its loan committee which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously from the time of its execution an official record of the bank."

Following a bench trial, the circuit court reached the following conclusions of law and fact:

"One that the Defendant did in fact execute the guarantee which is the subject of this cause on or about February 25th, 1975.

Second that after execution the Defendant left the subject guarantee with Mr. Betka [sic], a co-maker thereof and also a director of the then First National Bank of Oak Lawn.

Thirdly [sic], that the original of the subject guarantee was found in the collateral vaults in the First National Bank of Oak Lawn on the day after the FDIC took possession of that institution and was found in the file with the notes of Dennis Dine.

Fourthly [sic], the First National Bank of Oak Lawn funded a loan to Dennis Dine in the sum of $225,000 on February 28th, 1975.

Fifthly [sic], that at no time from February 28th, 1975 until this discharge in bankruptcy was Dennis Dine ever indebted to the First National Bank of Oak Lawn or the FDIC as its successor in interest in any sum less than $225,000, the maximum principal obligation on the guarantee which is the subject of this action.

Sixthly [sic], that the FDIC as receiver of the First National Bank of Oak Lawn transferred and assigned the guarantee to the FDIC in its corporate capacity.

Seventh, FDIC in its corporate capacity is the holder of the guarantee which is the subject of this action.

Eighth, that the Defendant has failed and refused to make any payments due pursuant to the terms of the subject guarantee for either principal or interest.

Ninth, that as of March 13th, 1989 Dennis Dine was indebted to the FDIC in its corporate capacity in principal sums in excess of $225,000 by reason of two notes executed April 28th, 1981.

Tenth, that as of March 13th, 1989, there was interest accrued on the obligation pursuant to the subject guarantee in the sum of $235,411.64, and interest continues to accrue thereon at the rate of $83.25 per day.

Eleventh, that any agreements between the Defendant and Wayne Betka [sic] that the subject guarantee would only be used by the First National Bank of Oak Lawn if same were necessary for that intitutuion [sic] to grant a lona [sic] to Dennis Dine is and was an unwritten agreement, invalid, unassertible as against the FDIC by reasons of the provisions of Section 1823-E, Title 12 of the United States Code.

Twelfth, that the release executed by the then First National Bank of Oak Lawn dated October 1, 1979, was not approved by its Board of Directors or ban Committee, nor was any approval thereof reflected in the minutes of the Board or Loan Committee, and as a consequence thereof the release is invalid and unassertible as against the FDIC by reason of the provisions of Section 1823-E of Title 12 of the U.S. Code.

Thirteen, the fact that the First National Bank of Oak Lawn did not in fact rely upon the subject guarantee in making of the loan of February 28th, 1975 to Dennis G. Dine is irrelevant for the purposes of application of

Section 1823-E generally under the holding of FDIC versus TWT 626 Fed sup [sic] 149.

Fourteen, no evidence has been introduced of any written notification by the Defendants to the First National Bank of Oak Lawn discontinuing the subject guarantee as required by the terms thereof, and any oral notification of discontinuance given or accepted being at variance with the terms of the subject guarantee is also invalid and unassertible against the FDIC by reason of Section 1823-E.

Fifteen, that even if one were to argue that the issuance of the release was an exercise of a unilateral right to release by the First National Bank of Oak Lawn as provided on the face of the guarantee, the exercise of that right of the issuance of the release on October 1, 1979 is unassertible as against the FDIC pursuant to Section 1823-E by reason of the lack of any approval therefore [sic] by the Board of Directors or ban Committee reflected in the minutes of the First National Bank of Oak Lawn."

On May 1, 1989, based upon the foregoing reasons, the trial court entered judgment in favor of FDIC and against O'Malley for a total sum of $464,490.80, consisting of $225,000 in principal and $239,490.89 in accrued interest. The order provided that it was nonfinal until the issue of attorney fees was resolved.

On January 16, 1990, O'Malley filed a post-trial motion in which he asserted that he was entitled to a new trial because, inter alia, Judge Hoffman should have recused himself pursuant to Supreme Court Rule 63(C)(1)(c) (113 Ill. 2d R. 63(C)(1)(c)) based on his prior representation of FDIC within the past seven years. O'Malley also contested the amount of interest awarded by the court on the guaranty.

On May 16, 1990, following a hearing, the trial court concluded that Supreme Court Rule 63(C)(1)(c) had not been violated, and denied O'Malley's motion for a new trial. The trial court held that the FDIC in its corporate capacity was not the same "party" as the FDIC as receiver. Since the trial judge had only represented the FDIC as receiver within the past seven years and the party before the court was the FDIC in its corporate capacity, the trial judge concluded that no violation of Rule 63(C)(1)(c) occurred.

The trial court granted the portion of O'Malley's motion which sought a reduction in the amount of interest awarded on the guaranty, and reduced the previous award of interest from $239,490.89 to $81,666.14. This appeal followed.

O'Malley presents the following arguments on appeal: (1) the trial court erred in finding that the guaranty was an "asset" of the Bank at the time of the FDIC takeover; (2) the trial court erred in finding that the release was not in substantial compliance with the provisions of section 1823(e); (3) the trial court erred in refusing to declare section 1823(e) unconstitutional; (4) the trial court erred in failing to find that O'Malley was discharged from the guaranty due to the continued extensions of credit to Dine and/or the sale of the Dine loans to LaSalle Bank; (5) the trial court erred in failing to grant O'Malley a setoff based on funds received from the sale of collateral securing the Dine loan and funds received from the settlement with the estate of Bekta; (6) the trial court erred in failing to find that O'Malley was entitled to a partial release of liability on the guaranty due to the FDIC's release of the alleged co-guarantor, Bekta; (7) the trial court erred in finding that the FDIC was entitled to interest on the guaranty; and (8) the trial court erred in denying the defendant a new trial where the provisions of Supreme Court Rule 63(C)(1)(c) were not complied with.

In its cross appeal, the FDIC asserts that the trial court erred in reducing its award of interest due to FDIC under O'Malley's guaranty.

I

Initially, O'Malley contends that the trial court erred in finding that the guaranty was an "asset" of the Bank at the time the FDIC took over. O'Malley presents three separate arguments in support of his contention that the guaranty was not an asset.

First, O'Malley argues that the guaranty was not a valid asset of the Bank because the guaranty never formed part of the Dine loan transaction. O'Malley asserts that the FDIC had the burden of demonstrating that the guaranty was valid and the FDIC failed to meet its burden.

O'Malley's argument is contrary to the law. The only burden the FDIC can be said to bear on this issue is the burden of demonstrating that the guaranty was found among the active files of the Bank. (See Federal Deposit Insurance Corp. v. Venture Contractors, Inc. (7th Cir. 1987), 825 F.2d 143, 146-47.) The FDIC met this burden. Mr. Murphy, a member of the FDIC takeover team testified that he found the guaranty in the Dine collateral file. O'Malley does not dispute that the Dine collateral file was an active file of the Bank.

O'Malley admits that he signed the guaranty. O'Malley also admits that he left the signed guaranty with Bekta, a member the Bank's board of directors. On its face, the guaranty is unconditional and applies to all liabilities owed by Dine up to $225,000. O'Malley's attempt to establish that the guaranty was never used in connection with any of the Dine loans is based upon his claim that he and Bekta had an understanding that the guaranty would only be used in the event that it was needed to secure the initial Dine loan.

Proof of this unwritten understanding is precluded by section 1823(e).

O'Malley's argument was specifically rejected in Federal Deposit Insurance Corp. v. Powers (N.D. Ill. 1983), 576 F. Supp. 1167, aff'd (7th Cir. 1984), 753 F.2d 1076. In Powers, the FDIC in its corporate capacity sought to enforce guaranty instruments. As in the instant case, the closed bank's files contained the guaranty instruments. One of the defendants, like O'Malley, contended that he never agreed to guaranty the subject obligations, and pointed out that the FDIC was unable to produce any listing of his guaranty in the bank's collateral register. The court rejected the defendant's contention that the guaranty was invalid, holding that the asserted defense was barred by section 1823(e):

> "The court holds Powers' asserted defense to be barred by Section 1823(e). The FDIC sues Powers on a facially sufficient written guarantee, and he wishes to defend on the basis of informal, unwritten arrangements and understandings between him and Drovers officials. These arrangements and understandings may have been convenient for the parties thereto, but they were not reflected in Drover's records. Powers wishes ultimately to prove that no guarantee contract ever existed, but that does not change the fact that he is asserting the type of private agreement that is invalidated by Section 1823(e)." Powers, 576 F. Supp. at 1171.

The reasoning of Powers is equally applicable to the case at bar. Accordingly, the trial court correctly held that section 1823(e) precluded O'Malley from asserting that the guaranty was invalid because it was not used in connection with the Dine loans.

O'Malley next asserts that the guaranty was not an asset of the Bank because the guaranty was extinguished by a written release executed by the Bank four years prior to the

FDIC takeover. The trial court held that O'Malley was barred from asserting the release as a defense because the release did not meet all of the requirements of section 1823(e). Specifically, the trial court found that the release was not reflected in the minutes of the Bank's board of directors. O'Malley attempts to avoid this result by asserting that section 1823(e) does not apply to assets which are extinguished prior to the FDIC takeover.

It is true that section 1823(e) does not apply to every inquiry concerning an asset. (Federal Deposit Insurance Corp. v. Merchants National Bank of Mobile (11th Cir. 1984), 725 F.2d 634, 639, cert. denied, 469 U.S. 829, 83 L.Ed. 2d 57, 105 S.Ct. 114.) For example, section 1823(e) does not bar the defense of fraud in factum. (See Langley v. Federal Deposit Insurance Corp. (1987), 484 U.S. 86, 98 L. Ed. 2d 340, 108 S.Ct. 396.) Section 1823(e) also does not bar the defense that the asset is invalid due to the breach of bilateral obligations contained on the face of the asset that the FDIC seeks to enforce. (See Howell v. Continental Credit Corp. (7th Cir. 1981), 655 F.2d 743.) However, O'Malley's release does not fit within any of the narrow exceptions previously recognized by the Federal courts.

Furthermore, each of the cases O'Malley relies on is readily distinguishable. In Federal Deposit Insurance Corporation v. Nemecek (D. Kan. 1986), 641 F. Supp. 740, the Decatur County National Bank brought suit against the defendants-debtors to recover on an overdue mortgage prior to the FDIC takeover. The parties reached a settlement agreement whereby the debtors promised to deliver to the bank quit claim deeds for the mortgaged property, and the bank promised to forgo seeking foreclosure and a deficiency judgment against the defendants. The quit claim deeds were delivered to the bank's attorneys by the defendants prior to the date the bank was taken over by the FDIC.

However, the deeds were not yet in the bank's possession, and a formal release of liability had not been signed by the bank prior to its closure.

The FDIC was appointed as receiver for the bank and was substituted as plaintiff in the bank's suit against the defendants. In response to the defendants' motion to enforce the settlement agreement, the FDIC asserted that under section 1823(e), the FDIC could not be bound by an oral settlement agreement which tended to reduce its interest in assets acquired from the bank.

The court refused to apply section 1823(e) to bar enforcement of the settlement because "section 1823(e) applies only to assets which the FDIC has acquired." (Nemecek, 641 F. Supp. at 743.) (Emphasis in original.) The court found that the bank and the defendants had reached an accord and satisfaction prior to the bank's closing. "Therefore, when the FDIC purchased the bank's assets, it could not have purchased defendants' note, as it had been previously extinguished." Nemecek, 641 F. Supp. at 743.

Unlike the defendants in Nemecek, O'Malley did not demonstrate that an accord and satisfaction took place. Instead, O'Malley relies on a blanket release which purported to release him from all liabilities owed to the Bank. The release does not mention the Dine guaranty and Geary testified that he was not even aware of the Dine guaranty when he issued the release. Accordingly, we find that Nemecek is inapposite to the facts of this case.

The remaining cases cited by O'Malley also fail to support his contention. In Commerce Federal Savings Bank v. Federal Deposit Insurance Corp. (6th Cir. 1989), 872 F.2d 1240, the court refused to apply section 1823(e) where the bank records pertaining to the instrument which the FDIC sought to enforce clearly indicated that the instrument had been "paid in full". In contrast to Commerce, nowhere in

the Bank's records is there any indication that O'Malley's guaranty was paid in full. In fact, O'Malley has never claimed that he paid the guaranty in full. He argues instead that his obligations were extinguished by a purported release which does not even refer to the guaranty on the Dine loan. Therefore, is also inapposite to the facts at bar.

O'Malley's reliance on Federal Deposit Insurance Corp. v. Blue Rock Shopping Center (3d Cir. 1985), 766 F.2d 744, is similarly misplaced. The holding of Blue Rock has been limited by a subsequent case from the Third Circuit. See Adams v. Madison Realty & Development, Inc. (3d. Cir 1991), 937 F.2d 845.

Each of the cases relied upon by O'Malley to support his contention that his obligation under the guaranty was extinguished prior to the FDIC takeover is inapposite. In contrast to the cases relied upon, O'Malley did not present any evidence at trial which would indicate that his guaranty was extinguished through an accord and satisfaction or full payment prior to the FDIC takeover. O'Malley may not avoid the requirements of 1823(e) by asserting that the guaranty was extinguished via an instrument which does not comply with 1823(e). The trial court properly rejected O'Malley's contention that the guaranty was extinguished prior to the FDIC takeover and, therefore, was not an "asset".

O'Malley next contends that the trial court erred in failing to recognize that section 1823(e) does not bar defenses which arise out of the same document which the FDIC seeks to enforce. O'Malley argues that because the guaranty states that the Bank may release him and that he may cancel his guaranty upon certain conditions his defenses arise from the guaranty instrument itself and, therefore, are not barred by section 1823(e). O'Malley's final attempt to evade the requirements of section 1823(e) is unavailing.

A narrow exception to the application of section 1823(e) has been recognized in cases where the instrument the FDIC seeks to enforce facially manifests bilateral obligations. (See Howell v. Continental Credit Corp. (7th Cir. 1981), 655 F.2d 743.) In Howell, the FDIC sought to recover sums due under a lease agreement obtained from a closed bank. The defendant argued that it was not obligated to make the lease payments because the bank never performed its obligations under the lease. The FDIC maintained that the defendants' defense was barred under section 1823(e). Relying on reasoning from Riverside Park Realty Co. v. Federal Insurance Deposit Corp. (M.D. Tenn. 1978), 465 F. Supp. 305, the court held that section 1823(e) was not applicable under to the facts of that case:

> "When the enforcement of a separate collateral or secret agreement would alter the terms of an asset acquired by the FDIC so that the FDIC's right, title or interest in the asset would be defeated or diminished, section 1823(e) comes into play. [Citations.]
>
> When, however, the asset upon which the FDIC is attempting to recover is the very same agreement that the makers allege has been breached by the FDIC's assignors, section 1823(e) does not apply. None of the policies that favor the invocation of this statute are present in such cases because the terms of the agreement that tend to diminish the rights of the FDIC appear in writing on the face of the agreement that the FDIC seeks to enforce." Howell, 655 F.2d at 747 quoting Riverside, 465 F. Supp. at 313. (Emphasis in original.)

Similarly, in Riverside, the court held that section 1823(e) did not bar the defendants from asserting a breach of the terms of a loan agreement which was incorporated by reference into the deed of trust that the FDIC sought to enforce. Both Riverside and Howell are distinguishable from the case at bar.

Unlike the instrument in Howell, O'Malley's guaranty does not facially manifest bilateral obligations which serve as the basis of his defense. Nor does O'Malley contend that any term of his guaranty was breached. The Bank did not agree in the guaranty instrument to release O'Malley. The language of the guaranty merely indicates that the Bank may, at its option, release a guarantor without notice. Such a release would constitute a separate agreement which must meet the requirements of section 1823(e).

O'Malley's contention that his cancellation defense arises from the guaranty itself and, therefore, should not have been barred under section 1823(e) is equally unpersuasive.

We note that the guaranty does provide that O'Malley may cancel his obligations under the guaranty if he provides "written notice to the Bank of [his] discontinuance of [the] guaranty." O'Malley contends that the mutual exchange of releases between O'Malley and the Bank constituted "written notice of discontinuance" as well as notice to the Bank that O'Malley was no longer a party to the guaranty subsequent to October 1, 1979. We disagree.

O'Malley's reliance on Federal Deposit Insurance Corp. v. Panelfab Puerto Rico, Inc. (1st Cir. 1984), 739 F. 2d 26 is misplaced. In Panelfab, the court found that the defendants had in fact executed a valid cancellation of their guarantees which complied with the express terms of the guaranty. (Panelfab, 739 F. 2d at 29.) The cancellation letter specifically referred to the guarantees at issue and the cancellation letter indicated that other guarantees had been substituted in place of the guarantees which were cancelled. In contrast, neither of the alleged releases which O'Malley relies on refer to the guaranty at issue. The documents are merely blanket releases. Neither release purports to provide notice of cancellation of the guaranty. In fact Geary, the president of the Bank, testified that he was not even aware

of the guaranty when he issued the release. The trial court did not err in finding that these documents could not serve as "written notice of discontinuance" as required by the guaranty agreement.

Although O'Malley has presented many innovative arguments in support of his contention that his guaranty was not an "asset" of the Bank at the time of the FDIC takeover, we remain unconvinced. The trial court properly held that O'Malley's guaranty was an asset under section 1823(e) and that O'Malley's defenses were barred by section 1823(e).

II

O'Malley next contends that the trial court erred in not finding that the alleged release was in substantial compliance with section 1823(e). O'Malley complains that the trial court took the position that "strict, literal, compliance with the provisions of section 1823(e) was required to remove the agreement from [the] statute's application." O'Malley's contention is devoid of merit; the trial court correctly applied the statute as written.

O'Malley has not cited any authority for the proposition that "substantial compliance" with section 1823(e) is sufficient to remove an agreement from the statute's requirements, and we are aware of none. Congress opted for certainty in enacting the requirements set forth in section 1823(e) (see Langley, 484 U.S. at 95, 98 L.Ed. 2d at 349, 108 S.Ct at 403), and this court is not at liberty to substitute a "substantial compliance" standard for the plain language of the statute. Accordingly, we hold that the trial court did not err in concluding that O'Malley's purported release failed to meet the requirements of section 1823(e).

III

O'Malley next contends that the trial court erred in refusing to declare section 1823(e) unconstitutional either

because it is vague and overbroad or because it impairs the obligations of contracts. O'Malley's contention that section 1823(e) is unconstitutional is without merit.

Section 1823(e) is in essence the codification of the United States Supreme Court case of D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corp. (1942), 315 U.S. 447, 86 L.Ed. 956, 62 S. Ct. 676. In D'Oench, the Supreme Court recognized that Federal policy protects the FDIC and the public funds it insures against misrepresentations of the bank's assets. To promote this Federal policy the Supreme Court concluded that as a matter of Federal common law, a borrower was estopped from asserting unrecorded agreements not reflected in the records of the bank against the FDIC. D'Oench, 315 U.S. 459, 461-62, 86 L. Ed. 963, 964, 62 S. Ct. 680, 681.

In 1950, Congress codified the D'Oench doctrine in 12 U.S.C. section 1823(e). No court in the nation has ruled that this statute is unconstitutional. The statute has been in effect for four decades and has been construed and enforced repeatedly by the Federal courts, including the United States Supreme Court. (See e.g. Langley, 484 U.S. 86, 98 L. Ed. 2d 340, 108 S. Ct. 396.) The few courts which have considered a constitutional challenge to section 1823(e) quickly dismissed such contentions with little discussion. (See e.g. Chatham Ventures Inc. v. Federal Deposit Insurance Corp. (5th Cir. 1981), 651 F.2d 355, cert. denied (1982), 456 U.S. 972, 72 L. Ed. 2d 845, 102 S. Ct. 2234; Beighly v. Federal Deposit Insurance Corp. (N.D. Tex. 1987), 676 F. Supp. 130, aff'd (5th Cir. 1989), 868 F.2d 776.) We conclude that the trial court did not err in rejecting O'Malley's constitutional challenge to section 1823(e).

IV

O'Malley next contends that the trial court erred in failing to find that O'Malley was discharged from the guar-

anty due to the continued extensions of credit to Dine and/or the sale of the Dine loans to LaSalle bank. This contention is wholly lacking in merit.

The express provisions of the guaranty authorize the Bank to sell the loans and extend additional credit to Dine without impairing the validity of the guaranty. The relevant provisions of the guaranty are as follows:

> "This guaranty shall be a continuing, absolute and unconditional guaranty * * *
>
> The Bank may, from time to time, without notice to the undersigned * * * (c) extend or renew for any period (whether or not longer than the original period), alter or exchange any of the Liabilities, * * *
>
> The Bank may, without notice of any kind, sell, assign and transfer all or any of the Liabilities, and in such event each and every immediate and successive assignee, transferee, or holder of all or any Liabilities shall have the right to enforce this guaranty * * *
>
> No action of the Bank permitted hereunder shall in any way impair or affect this guaranty * * *" (Emphasis added.)

In light of the express provisions of the guaranty, we find that the trial court did not err in concluding that O'Malley was not discharged from his obligations on the guaranty due to the continued extensions of credit to Dine and/or the sale of the Dine loans to LaSalle bank.

V

O'Malley next contends that the trial court erred in not allowing a setoff for the sale of the collateral securing Dine's loans. We disagree.

In O'Malley's guaranty, he agreed to unconditionally guarantee the liabilities of Dine up to the amount of

$225,000 plus interest. As the trial court found, the evidence indicated that at all relevant times, Dine was indebted under his two notes in amounts of at least $225,000 in principal. There was testimony that certain collateral for the Dine loans was taken by the FDIC and that a $118,879.38 credit was given against the amounts due under the Dine loans. The FDIC representative, Mr. Adamonis testified that he believed the credit had been applied to accrued interest. O'Malley's guaranty provided that:

> "Any amount received by the Bank from whatever source and applied by it toward the payment of the Liabilities shall be applied in such order of application as the Bank may from time to time elect."

In light of the language of O'Malley's guaranty and the evidence that the principal balance due on the two Dine notes was $943,309.19, even the application of the $118,879.38 credit against the principal due from Dine would still have left an amount far greater than $225,000 as principal due from Dine. On the other hand, as the trial court recognized, if the $118,879.38 credit was applied to accrued interest, there would also have remained far greater than $225,000 due the FDIC from Dine as principal. The trial court's findings were not against the manifest weight of the evidence. We hold that the trial court properly concluded that O'Malley was not entitled to a setoff due to the sale of the Dine collateral.

O'Malley also contends that the trial court erred in failing to grant a setoff for funds received from the estate of Wayne Bekta in settlement of the guaranty claim. We disagree.

We note initially that the guaranty does not provide for a setoff of any kind. Moreover, O'Malley has not cited a

single authority for the proposition that a setoff may be allowed against assets in possession of the FDIC.

Even if we were to assume that a setoff could be allowed, the evidence presented at trial does not support the setoff claimed by O'Malley. O'Malley argues that a setoff should be computed by proration based upon the alleged settlement agreement's references to the apparent principal amounts of five Bekta notes and the guaranty, which aggregate $1,090,000. There was no evidence introduced by O'Malley concerning the total amounts actually due under the five Bekta notes referenced in the alleged agreement, or of principal, interest, and other sums due under those Notes. We conclude that O'Malley's asserted setoff computation is speculative and unsupported by the record.

VI

O'Malley next contends that the trial court erred in failing to find that he was entitled to a partial release of liability on the guaranty due to FDIC's release of the alleged co-guarantor, Bekta. We disagree.

The general rule is that the release of a co-guarantor releases the remaining guarantors of liability on the guaranty to the extent of the proportionate value of their respective lost rights of contribution against the released guarantor, absent a contrary agreement between the guarantor and the guarantee. (In Re: Estate of Tiemann (1986), 141 Ill. App. 3d 512, 515.) In this case, however, the trial court found that the language of the guaranty did create a contrary agreement. The guaranty contained the following provisions:

> "The Bank may, from time to time, without notice to the undersigned (or any of them), * * * (d) release or compromise any liability of any of the undersigned hereunder, * * * and (f) resort to the undersigned (or any of them) for payment of any Liabilities * * *

> No action of the Bank permitted hereunder shall in any way impair or affect this guaranty."

The trial court found that the plain language of the guaranty contemplated the release of a co-guarantor without impairment of the guaranty as to the remaining guarantor. We agree. Accordingly, we hold that the trial court properly concluded that O'Malley was not entitled to a partial release.

VII

O'Malley next contends that the trial court erred in finding that the FDIC was entitled to interest on the guaranty. In its cross-appeal, the FDIC contends that the trial court erred in reducing the amount of interest awarded to the FDIC.

The guaranty instrument provides that the FDIC is entitled to recover $225,000 "plus interest on such amount" from O'Malley. The guaranty does not prescribe an interest rate. O'Malley argues that because no interest rate is stated and nothing in the guaranty document provides a method for computing interest, the trial court erred in awarding interest on the guaranty. Alternatively, O'Malley argues that if FDIC was entitled to interest, it should only have been awarded at the statutory rate. The trial court rejected both arguments.

The trial court found that the only logical interpretation of the term "interest" was that it referred to the interest rate provided in the underlying guaranty. The trial court found that any other interpretation would render the phrase meaningless because absent the word "interest" the FDIC would have been entitled to statutory interest anyway under Ill. Rev. Stat. 1983, ch. 17, par. 6402.

FDIC contends that the trial court erred in limiting the amount of interest due on the guaranty to the period of

time prior to April 29, 1983. The trial court held that the FDIC failed to sustain its burden of proving the amount due after April 29, 1983.

At trial, the court awarded the FDIC interest in the sum of $239,450.89 based upon the testimony of Mr. Adamonis. Mr. Adamonis testified that he calculated the interest by using a PC program which loaded the interest rate and the dates that the prime rate changed and automatically calculated the interest. However, Mr. Adamonis did not state the source of the prime rate. He testified that the Bank's prime rate was "most closely tied to Continental's prime and the banks historics [sic] showed that they changed on even dates with the Continental Bank prime rate." Upon reviewing the record for purposes of the post-trial motion, the trial court realized that it had assumed that Mr. Adamonis used the Continental rate, but Mr. Adamonis never testified that he in fact used the Continental rate.

The trial court found that Mr. Adamonis never testified as to what rate or rates he did in fact use or the source of those rates. The trial court concluded that since, it was the FDIC's burden to prove the amount of interest to which it was entitled, and the FDIC did not meet its burden, the court's previous award of interest based upon Mr. Adamonis's calculations was erroneous.

After reviewing the record further, the trial court concluded that there was an alternative ground to support an award of interest to the FDIC, albeit a lesser award. The trial court observed that the April 28, 1983 trial balance of the Bank indicated that as of that date, the accrued interest on the Dine notes was $342,415.70. The trial balance was properly admitted into evidence as a business record of the bank.

The trial court calculated the total interest owed by O'Malley by multiplying the percentage of the Dine princi-

ple guaranteed by O'Malley times the total interest due. O'Malley guaranteed $225,000. The trial court concluded that the guaranteed sum of $225,000 was 23.85% of the total principal amount, $923,308.99. The court then multiplied 23.85% times the total interest accrued, $342,415.70, to arrive at the amount of interest owed by O'Malley, $81,666.14. The court found that the FDIC was not entitled to any interest in excess of $81,666.14 because it failed to prove it was entitled to additional interest.

After a careful review of the record, we find no error in the procedure followed by the trial court to determine the amount of interest that the FDIC was entitled to receive. However, it appears that the trial court's computations were in error. According to the trial court computations, FDIC was entitled to $81,664.14. Our review of the computations based upon the principal and interest sums reflected in the record indicates that $225,000 should be 24.37% (not 23.85%) of the total principal amount, $923,308.99, and that the correct computation of interest owed to the FDIC amounts to $83,446.71. Therefore, we must remand this portion of the decision for correction.

VIII

Finally, O'Malley contends that he is entitled to a new trial because a violation of Rule 63(C) occurred.

Supreme Court Rule 63(C) provides in relevant part:

"C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

* * *

(c) he was, within the preceding three years, associated in the private practice of law with any law firm or

lawyer currently representing any party in the controversy * * * or, for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law, * * *" 113 Ill. 2d R. 63(C)(1)(c).

Supreme Court Rule 63(D) provides an alternative to disqualification where Rule 63(C)(1)(c) is implicated:

"D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3(C)(1)(c), * * * may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship or interest is immaterial, the judge is no longer disqualified and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding." 113 Ill. 2d R. 63(D).

On the first day of trial, Judge Hoffman disclosed his prior representation of FDIC to counsel in open court and counsel for both parties waived any objection to the judge's participation:

"THE COURT: I will tell you now for the record what I told you before lunch, that is on the liquidation of the Gateway National Bank of Chicago, I had occasion to represent the interests of FDIC. I had nothing to do with the FDIC in this case with First National of Oak Lawn, nor do I know who the liquidator of that liquidation is. Unless a party wishes to exercise a change of venue at this particular juncture, I am ready to start the trial.

MR. FITZPATRICK: You didn't work as an employee of FDIC?

THE COURT: Independent counsel representing the FDIC on liquidation of Gateway National Bank of Chicago, never an employee.

MR. FITZPATRICK: We have no objection.

MR. MALONEY: There is no objection at this time."

The dates of the trial judge's representation of the FDIC were not disclosed at this time. O'Malley was not in court at the time of the disclosure and defense counsel never discussed the waiver of any conflict of interest with O'Malley.

Sometime after the conclusion of the trial, the Third District of this court handed down the decision of Woods v. Durkin (1989), 183 Ill. App. 3d 870. In Woods, the court held that where Rule 63(C) is implicated, an oral waiver by the attorneys will not relieve the judge from his duty to disqualify himself. Only strict compliance with the provisions of Rule 63(D) will relieve the judge of the duty to disqualify himself. Based upon the holding in Woods, O'Malley filed a post-trial motion alleging that despite the good faith of the court and counsel, Rule 63(C) had been violated and a new trial was required.

At a hearing regarding the post-trial motion on January 24, 1990 the trial judge made the following additional disclosures:

"THE COURT: The parties should know the following: Federal Deposit Insurance Company issued a resolution under sealed court records on July 14, 1979, Document No. 29597, designating the FDIC as a secret liquidator of the Gateway and National Bank of Chicago. That document was recorded in the Office of the Recorder of Deeds, Document No. 25064900. As a consequence of that liquidation, the law firm of which I was a partner represented the FDIC for a period of time.

It would appear in the representation of the FDIC that there were three cases that were still pending within seven years of the commencement of the case of FDIC versus O'Malley. The first would have been Gateway National Bank of Chicago versus Morris Halas, 78 CH 5525, which was dismissed by order of Judge Scotillo on August 11, 1982; the second being Gateway National Bank of Chicago versus Emmet Thomas, which was placed on the bankruptcy calendar by Judge Hechinger on November 29, 1982; the last being Gateway National Bank of Chicago versus Texas Harris, and that was a case that was dismissed by order of Judge Green on May 11, 1982. Each of these dates are within seven years of commencement of the trial of FDIC versus O'Malley.

* * *

THE COURT: Yes, I personally represented the FDIC in all three of those cases.

[However], I can also indicate to you that there was no personal representation by me within the seven-year period, although I must indicate—and I am doing this from handwriting on the orders of the proceedings that are within these files—I should also indicate to you that I was a named partner of that firm and everything that had to do with that firm's representation of the FDIC at all times was under my direct supervision. There was no other partner of that law firm that was charged with the responsibility of supervising the FDIC case assigned to that firm at any time.

MR. CHALFEN: You did not personally appear in court?

THE COURT: Within the seven-year period, to the best of my knowledge, no, but I want to make it clear.

> Every lawyer who did appear in that court for that law firm within that seven-period would have done so under my direct supervision.
>
> MR. CHALFEN: May I also clarify what your Honor indicated, I believe at the commencement of the trial that you never personally represented the FDIC in its corporate capacity?
>
> THE COURT: No. I represented it only in its capacity as liquidator or receiver of the Gateway National Bank of Chicago * * *."

In Woods, the court held that once Rule 63(C) comes into play, the judge must disqualify himself or both the parties and their attorneys must comply with Rule 63(D). Rule 63(D) requires all of the parties and lawyers to agree in writing that the judge's relationship or interest is immaterial. It is undisputed that no written agreement between the parties and lawyers was executed in this case. Under Woods, the oral waiver by the attorneys was insufficient. Therefore, if Rule 63(C) were violated, O'Malley would be entitled to a new trial. For the reasons which follow, we conclude that no violation of Rule 63(C) occurred.

The circuit court held that Rule 63(C) was not violated because the circuit court judge previously represented the FDIC as receiver, and the party before the court at trial was the FDIC in its corporate capacity. The trial court concluded that the FDIC as receiver was not the same "party" as the FDIC as a corporate entity within the meaning of Rule 63(C)(1)(c).

We question the correctness of the trial court's conclusion that the FDIC as receiver is not the same "party" as the FDIC acting as a corporate entity. However, we need not address this issue because we conclude that there is another basis upon which to sustain the decision of the trial

court. As a reviewing court we can uphold the trial court's decision on any ground which is supported by the record, regardless of whether the trial court relied on the ground and regardless of whether the trial court's reasoning was correct. Bell v. Louisville & Nashville R.R. (1985), 106 Ill. 2d 135, 148; Ahern v. Knecht (1990), 202 Ill. App. 3d 709, 715.

Rule 63(C)(1)(c) requires a judge to disqualify himself "where * * * for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while engaged in the private practice of law." For the reasons which follow, we conclude that Judge Hoffman did not "represent" the FDIC in the manner contemplated by Rule 63(C)(1)(c).

With respect to the rules governing disqualification of judges, our supreme court has previously recognized a distinction between conduct which is merely supervisory and conduct which rises to the level of "acting as counsel." (People v. Del Vecchio (1989), 129 Ill. 2d 265, cert. denied (1990) 494 U.S. 1062, 108 L. Ed. 2d 779, 110 S. Ct. 1540.) In Del Vecchio, the supreme court construed the language of former Rule 67(c) which is the predecessor of Rule 63(C). Former Rule 67(c) provided:

> "A judge shall not participate in any case in which he has previously acted as counsel. He cannot rid himself of this responsibility by consent of counsel or the parties to the case." (73 Ill. 2d R. 67(c).)

In Del Vecchio, the defendant asserted that he was entitled to a new trial based upon the trial judge's involvement in a previous case in which the defendant was convicted of murder. The trial judge was an assistant State's Attorney and chief of the criminal division during the time the previous case involving the defendant was pending. The trial judge's involvement in the previous case consisted of assign-

ing the case to another attorney and approving the defendant's request to expedite the indictment. Under these circumstances the supreme court concluded that the trial judge did not "act as counsel" in the previous case. Del Vecchio, 129 Ill. 2d at 278.

We acknowledge that in Del Vecchio, the supreme court was interpreting the language of former Rule 67(c) which differs from the language of current Rule 63(C). However, since Rule 63(C)(1)(c) incorporates former Rule 67(c), it is proper to look to decisions interpreting the former rule for guidance. (See People v. Lopez (1989), 187 Ill. App. 3d 999, 1008.) Furthermore, this court has previously found that the rationale of Del Vecchio is applicable to cases involving the present version of Rule 63(C). See People v. Storms (1992), 225 Ill. App. 3d 558, 566; Lopez, 187 Ill. App. 3d at 1008-09.

The key words in former Rule 67(c) were "previously acted as counsel." (73 Ill. 2d R. 67(c).) These words were applicable both to assistant State's Attorneys and to private attorneys. The court in Del Vecchio considered the nature of the involvement of the assistant State's Attorney and held that the assistant State's Attorney did not "act as counsel." Del Vecchio, 129 Ill. 2d at 278.

The key words in Rule 63(C)(1)(c) are "represented any party to the controversy." (113 Ill. 2d R. 63(C)(1)(c).) In this case, Judge Hoffman was the partner in charge of all cases involving the FDIC at his law firm. He stated that he would have directly supervised and reviewed work done by associates in connection with FDIC matters. On the other hand, Judge Hoffman also stated on the record that he had "no recollection of having personally appeared in court or handled these matters within the past seven years." His records indicated that the last of the FDIC cases were disposed of in 1982.

The Rule enunciated in Del Vecchio is that "merely having a previous involvement with a defendant does not, per se, require disqualification." (Del Vecchio, 129 Ill. 2d at 277.) Illinois courts have rejected the rule that recusal is mandatory "if the trial judge was in any way associated with the case." (United States ex. rel. Link v. Lane (7th Cir. 1987), 811 F.2d 1166, 1171.) That rule is equally applicable in this case. Merely having the previous involvement as appears from the facts of this case does not, per se, require disqualification. Applying the rationale of Del Vecchio and its progeny, we conclude that Judge Hoffman's supervision of these cases did not amount to "representation" within the meaning of Rule 63(C)(1)(c) and disqualification was not required. Therefore, no violation of Supreme Court Rule 63(C)(1)(c) occurred.

Assuming arguendo that a violation of Rule 63(C)(1)(c) did occur, reversal of the trial court's decision would not be warranted. In this case, neither counsel nor the trial judge were aware of any ground for recusal until the completion of the trial. It cannot be said that an appearance of impropriety was created under these circumstances. Furthermore, the trial judge indicated that he had no recollection of personally representing the FDIC within the seven year period. Under the facts and circumstances of this case, a determination that any violation of Rule 63(C)(1)(c) mandates a per se reversal would serve neither the purposes of the Rule nor the ends of justice.

In summary, we conclude that the trial court correctly held that O'Malley's defenses were barred by section 1823(e) and that the guaranty at issue was an "asset" for purposes of section 1823(e). The trial court correctly held that O'Malley was not discharged from his obligations under the guaranty due to the continued extensions of credit to Dine or the sale of the Dine loans to LaSalle bank.

The trial court correctly held that O'Malley was not entitled to any setoff or partial release from liability. The procedure used by the trial court to determine the amount of interest due on the guaranty instrument was not erroneous, but its computations were incorrect. Accordingly, the trial court is directed to review the interest computations and enter the correct amount upon remand. Finally, a new trial was not warranted because Supreme Court Rule 63(C)(1)(c) was not violated.

Affirmed in part, reversed in part and remanded with directions.

McNULTY, J., specially concurring.

GORDON, P.J., concurring in part and dissenting in part.

JUSTICE MCNULTY, specially concurring:

I agree that a literal reading of Supreme Court Rule 63(C)(1)(c) supports the dissenting opinion's view in this case that disqualification of the trial judge was required absent a written remittur by counsel and the parties.

It further concludes, however, that while the majority apparently construe the rule to permit a qualitative evaluation to be made as to whether disqualification is required it can find no such discretionary latitude under the rule as currently drafted.

It is my opinion that the supreme court in People v. Del Vecchio (1989), 129 Ill. 2d 265, 544 N.E.2d 312, construing the language of former Rule 67(C), the predecessor to Rule 63(C) provides the authority to permit a qualitative evaluation to be made of the facts and circumstances of each case in which the issue of disqualification is raised. Therefore, I conclude that under the facts and circumstances of this

case, a determination that any violation of Rule 63(C)(1)(c) mandates a per se reversal, would advance neither the purpose of the rule nor the ends of justice.

PRESIDING JUSTICE GORDON concurring in part and dissenting in part:

While I agree with the analysis of the majority as to the merits of the claim of the FDIC against the defendant, I must disagree with respect to the analysis of the issues raised under Supreme Court Rule 63(C)(1)(c). (134 Ill. 2d R. 63(C)(1)(c).) Under the provisions of Supreme Court Rule 63(C)(1)(c), a judge must disqualify himself unless all agree otherwise in writing if, "for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law." (134 Ill. 2d

le provides:

d disqualify himself in a proceeding
partiality might reasonably be questioned, including but not limited to instances where:

* * *

(c) he was, within the preceding three years, associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy (provided that referral of cases when no monetary interest was retained shall not be deemed an association within the meaning of this subsection) or, for a period of seven years following the last date on which he represented such a party, he represented any party to the controversy while he was an attorney engaged in the private practice of law."

134 Ill. 2d R. 63(C)(1)(c).

BEST AVAILABLE COPY

The majority has incorrectly attempted to apply the distinction made by the Supreme Court in People v. Del Vecchio (1989), 129 Ill. 2d 265, 544 N.E.2d 312, a criminal prosecution, to the facts of this case. In Del Vecchio the Illinois Supreme Court interpreted the former Supreme Court Rule 67(c), (73 Ill. 2d R. 67(c)), to require a judge who was a former State's Attorney to recuse himself only if he was the actual counsel in the prosecution and not if he was a mere supervisor or department head with only nominal involvement in the prosecution. The court held that the phrase "acted as counsel" under the old rule excluded involvement consisting solely of personal supervision or mere approval of ministerial administrative procedures.

However, there is a very substantial difference between the nature of the representation provided with respect to attorneys in the private practice of law and those engaged in the public practice as employees of a governmental agency.

In the public sector the relationship between counsel and client is different in nature since the attorney has no special financial or proprietary interest in the client, namely the government or the public agency by whom the attorney was employed. There the focal point of the attorney/client relationship consists of the specific dispute in which the lawyer is acting on the client's behalf. This aspect was emphasized under former Rule 67(c), the predecessor of the current rule, which prohibits the judge from participating in a case in which he had previously acted as counsel.

Former Rule 67(c) provided:

> "A judge shall not participate in any case in which he has previously acted as counsel. He cannot rid himself of this responsibility by consent of counsel or the parties to the case." (73 Ill. 2d R. 67 (c).)

The prohibition under former Rule 67(c) is now covered under Rule 63(C)(1)(b). Rule 63(C)(1)(b) provides that judicial recusal is required if, "he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it." (134 Ill. 2d R. 63(C)(1)(b).) Under Rule 63(C)(1)(b), no distinction is made between the private and public practice of law.

Subsection 63(C)(1)(c) however applies specifically to the past relationship between the judge and his former clients even though the case or "controversy" is new. Under this provision the judge's past relationship with the client should not depend on whether he or she represented that client in court but rather whether he or she was a member of the firm when that client was represented and whether he or she shared in that client's fees.

The distinction drawn by the majority pursuant to People v. Del Vecchio extends only to the provisions of former Rule 67(c) under which it was decided and under its present counterpart, Rule 63(C)(1)(b), which prohibits service of the judge where "he served as a lawyer in the matter in controversy." 134 Ill. 2d R. 63(C)(1)(b).

In point of fact, the current Rule 63(C)(1)(c) specifically excludes from its provisions past representation by virtue of employment in governmental agency, by specifying, "while he was an attorney engaged in the private practice of law." 134 Ill. 2d R. 63(C)(1)(b); Ill. Ann. Stat., ch. 110A, R. 63(C), Committee Comments, at 30-33 (Smith-Hurd 1992).

Under Rule 63(C)(1)(c) which applies to the private sector only, no meaningful distinction can be drawn between the interest of the actual trial counsel and the billing or supervisory partner. If anything, the partner who approves of

and bills out the work performed for a client or for that matter who shares in the ravenines derived from a client is as likely to find himself with conflicting interests or loyalties as the attorney who performed the work in the legal trenches.

Moreover, the trial judge in this case did not disclaim participation in quarterbacks the strategies on behalf of the FDIC. He merely stated that he did not make any court appearances on its behalf but disclosed that he had full supervisory authority over the matters which his office handled on that client's behalf.

The parallel structure of Rule 63(C)(1)(c) supports this conclusion as well. The first portion of 63(C)(1)(c) which controls for 3 years applies to any judge associated in the practice with any lawyer or law firm representing a client before such judge. Thus, for a three year period, even if the client came to the firm after the judge terminated his association with it, the judge must still recuse himself based upon his association with it notwithstanding that such association predated the acquisition of that client. The second part which provides for a seven year restriction should then apply, as I believe it does, to those situations where the client was being represented by the firm during the time the judge was associated with it, even though the judge did not then take an active role in that clients matters. Otherwise, the rule would not provide for such instances where the judge was associated with a firm while it represented the client where his role regarding that client was passive. Such instances would then have to be treated within the first provision of 63(C)(1)(c) which does not require the judge to be associated with the firm contemporaneously with its representation of the client as long as he was associated with that firm within the designated three year period.

While the majority apparently construe the rule to permit a qualitative evaluation to be made as to whether reversal is required, we can find no such discretionary latitude under the rule as currently drafted. Moreover, the language of 63(D) which permits waiver only if "the parties and lawyers * * * all agree in writing" would seem to militate against any mitigation where such written waiver is not provided.

While the scope of 63(C)(1)(c) is perhaps stricter than necessary particularly in the case of mega-lawfirms with several hundred partners and clients numbering in the hundreds if not thousands, it is not wholly inappropriate with respect to smaller firms where every partner is aware of the various clients which the firm represents and the resultant benefits which he or she may derive from it. In any event it is not for us to redraft the rule by judicial fiat but to enforce its provisions as we find them.

The fact that the disclosure in this case that the full seven years had not yet expired, did not occur until the case was adjudicated should not be determinative. Notwithstanding that the court in Woods v. Durkin (1989), 183 Ill. App. 3d 870, 539 N.E.2d 920, appeared to take note of that factor in distinguishing the result of the Federal decision in United States ex rel. Weinberger v. Equifax, Inc. (5th Cir. 1977), 557 F. 2d 456, I cannot agree that a purposeful distinction can be predicated upon the timing of the disclosure. This would leave the control of the impact of the rule in the hands of the judge whose participation the rule intends to restrict and regulate.

In Woods, even though the attorneys were apprised upfront of the grounds for the judge's disqualification they were permitted to await his ruling on the merits before asserting their rights under 63(C)(1)(c) to disqualify the judge and obtain a new trial. A fortiori, a party should have

the right to disqualify the judge retroactively where the grounds for disqualification are not disclosed to him until after judgment.

While in this case it is clear that the trial judge acted in good faith and with complete candor and with full and prompt disclosure as soon as the facts became known to him, reversal is nevertheless mandatory under these circumstances where written waiver was not provided. See generally Woods v. Durkin.

[ENTERED AUGUST 10, 1993]

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Federal Deposit Insurance Corporation,	)	
Plaintiff-Appellee and Cross-Appellant,	)	
v.	)	
Michael J. O'Malley,	)	No. 1-90-1718
Defendant-Appellant and Cross-Appellee.	)	
Shiley, Inc.,	)	
Third Party Defendant-Appellee.	)	

ORDER

Defendant-Appellant's Petition for Rehearing is denied.

ENTER:

/s/ Jill K. McNulty
Justice

/s/ William Cousins, Jr.
Justice

7-27-93 Having dissented in part from the majority I would favor a rehearing with respect to that portion.

/s/ Joseph Gordon
Justice

[DATED MAY 1, 1989]

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	
v.	)	No. 84-L-999
MICHAEL J. O'MALLEY,	)	
Defendant.	)	

JUDGMENT ORDER

This matter having come to be heard for ruling pursuant to trial and the submission of briefs, the court having considered the law, the evidence, and the arguments of counsel and being otherwise fully advised, IT IS ORDERED, ADJUDGED AND DECREED:

1. For the reasons and based upon the findings orally stated by the court, judgment is entered in favor of the FDIC and against Michael J. O'Malley in the sum of $464,490.89 (including $225,000 for principal and $239,490.89 for interest through 5/1/89).
2. This order is non-final and interlocutory until resolution of the issues of attorneys fees.
3. Maloney & Chalfen shall submit to deposition re attorney fees expended.

4. This cause is continued to June 5, 1989 at 9:30 for hearing on fees without further notice.

May 1, 1989

/s/ _____
Judge Thomas E. Hoffman

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	
v.	)	No. 84-L-999
MICHAEL J. O'MALLEY,	)	
Defendant.	)	

FINDINGS ANNOUNCED IN OPEN COURT ON MAY 1, 1989

One that the Defendant did in fact execute the guarantee which is the subject of this cause on or about February 25th, 1975.

Second that after execution the Defendant left the subject guarantee with Mr. Bekta, a co-maker thereof and also a director of the then First National Bank of Oak Lawn.

Thirdly, that the original of the subject guarantee was found in the collateral vaults in the First National Bank of Oak Lawn on the day after the FDIC took possession of that institution and was found in the file with the notes of Dennis Dine.

Fourthly, the First National Bank of Oak Lawn funded a loan to Dennis Dine in the sum of $225,000 on February 28th, 1975.

Fifthly, that at no time from February 28th, 1975 until this discharge in bankruptcy was Dennis Dine ever indebted to the First National Bank of Oak Lawn or the FDIC as its successor in interest in any sum less than $225,000, the maximum principal obligation on the guarantee which is the subject of this action.

Sixthly, that the FDIC as receiver of the First National Bank of Oak Lawn transferred and assigned the guarantee to the FDIC in its corporate capacity.

Seventh, FDIC in its corporate capacity is the holder of the guarantee which is the subject of this action.

Eighth, that the Defendant has failed and refused to may any payments due pursuant to the terms of the subject guarantee for either principal or interest.

Ninth, that as of March 13th, 1989 Dennis Dine was indebted to the FDIC in its corporate capacity in principal sums in excess of $225,000 by reason of two notes executed April 28th, 1981.

Tenth, that as of March 13th, 1989, there was interest accrued on the obligation pursuant to the subject guarantee in the sum of $235,411.64, and interest continues to accrue thereon at the rate of $83.25 per day.

Eleventh, that any agreements between the Defendant and Wayne Bekta that the subject guarantee would only be used by the First National Bank of Oak Lawn if same were necessary for that institution to grant a loan to Dennis Dine is and was an unwritten agreement, invalid, unassertible as against the FDIC by reasons of the provisions of Section 1823(e), Title 12 of the United States Code.

Twelfth, that the release executed by the then First National Bank of Oak Lawn dated October 1, 1979, was not approved by its Board of Directors or Loan Commit-

tee, nor was any approval thereof reflected in the minutes of the Board or Loan Committee, and as a consequence thereof the release is invalid and unassertible as against the FDIC by reason of the provisions of Section 1823(e) of Title 12 of the U.S. Code.

Thirteen, the fact that the First National Bank of Oak Lawn did not in fact rely upon the subject guarantee in making of the loan of February 28th, 1975 to Dennis G. Dine is irrelevant for the purposes of application of Section 1823(e) generally under the holding of FDIC versus TWT 626 Fed sup 149.

Fourteen, no evidence has been introduced of any written notification by the Defendants to the First National Bank of Oak Lawn discontinuing the subject guarantee as required by the terms thereof, and any oral notification of discontinuance given or accepted being at variance with the terms of the subject guarantee is also invalid and unassertible against the FDIC by reason of Section 1823(e).

Fifteen, that even if one were to argue that the issuance of the release was an exercise of a unilateral right to release by the First National Bank of Oak Lawn as provided on the face of the guarantee, the exercise of that right of the issuance of the release on October 1, 1979 is unassertible as against the FDIC pursuant to Section 1823(e) by reason of the lack of any approval therefore by the Board of Directors or Loan Committee reflected in the minutes of the First National Bank of Oak Lawn.

By reason of the foregoing, judgment is entered in favor of the Plaintiff and against the Defendant a total sum of $464,490.80, consisting of $225,000 in principal and $239,490.89 in accrued interest, through and inclusive of May 1st, 1989.

* * * * *